IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

Eddie Mack Gipson, Appellant

VS.

The State of Texas, Appellee

NO. 75-1408

# JURISDICTIONAL STATEMENT

ON APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES OF AMERICA
FROM THE COURT OF
CRIMINAL APPEALS OF TEXAS

ATTORNEYS FOR APPELLANT:

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IN THE SUPREME COURT
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# JURISDICTIONAL STATEMENT

## Opinion of Court Below

By opinion dated December 3, 1975, the Court of Criminal Appeals of Texas affirmed the judgment of the trial court wherein appellant was convicted of a violation of a provision of the Texas Controlled Substances Act of 1973, Vernon's Ann. Civ. Stat. Art. 4476--15 et seq., and was assessed a two year probated sentence thereunder. Said opinion, a copy of which is set out in full and attached hereto as Appendix 1 is made a part hereof for all pertinent purposes; this opinion is not reported, it being per curiam. (Appendix 1 at pages a-b.)

## Grounds Invoking Jurisdiction of the Supreme Court of the United States

This is a direct appeal from the final judgment of the Court of Criminal Appeals of Texas, in which forum appellant had timely and properly lodged a question as to the validity of a Texas statute because of its alleged repugnance to a law of the United States and to the United States Constitution, Supremacy Clause; said question having been answered by said state court against appellant and for the validity of the Texas statute. Appellant has exhausted his state remedies, the Court of Criminal Appeals of Texas being the court of last

resort in that state in criminal cases (Appendix 8 at page v), its judgment of affirmance (Appendix 2 at page c) having become final on January 7, 1976 (Appendix 3 at page d), by virtue of the denial on January 7, 1976, of appellant's timely motion to said Court for leave to file a motion for rehearing.

Appellant now seeks to invoke the jurisdiction of the Supreme Court of the United States by direct appeal seeking a reversal of the Court of Criminal Appeals of Texas' final judgment of affirmance on the ground that the Texas laws (Appendix 7 at pages p-u) under which appellant was adjudged guilty and assessed punishment are invalid because same are repugnant to the laws of the United States (Appendix 6 at pages k-o) and to the Constitution of the United States, Supremacy Clause (Appendix 6 at page o).

The statutes pursuant to which this appeal is brought are contained in:

(A) Federal Laws

(1) The Federal Comprehensive Drug Abuse and Control Act of 1970, Title 21 U.S.C.A. Sec. 801 et seq., the specific provisions of said act involved herein being cited as 21 U.S.C.A. Sec. 843(a)(3)(c) and as 21 U.S.C.A. Sec. 903, and cited as Title 21, U.S.C.A., Sec. 812, Schedule III(a)(2), and

(2) Article VI, Section 2, United States Constitution (Appendix 6 at pages k-o).

(B) Texas Laws

(1) The Texas Controlled Substance Act of 1973, Vernon's Ann. Civ. Stat. Art. 4476--15 et seq., the specific provisions of said act involved herein being cited as Vernon's Ann. Civ. Stat. Art. 4476--15, Sec. 4.09(a)(3), Sec. 4.09(b)(1)., Sec. 4.01(b)(2), and Sec. 2.04(a)(d)(4), being the specific Texas statutes that are a burden to appellant

which he asserts are invalid because same are repugnant to the Federal Laws set forth in subdivision (a) above. (Appendix 7 at pages p-u.)

## Dates Pertinent to the Jurisdiction

Appellant seeks to have the final judgment of the Court of Criminal Appeals of Texas reviewed. The date of said judgment is December 3, 1975, the date it became final is January 7, 1976. Appellant's timely motion to the Court of Criminal Appeals of Texas for leave to file a motion for rehearing was filed December 18, 1975, and was denied by order dated January 7, 1976. Appellant's first notice of appeal to the Supreme Court of the United States (Appendix 4 at pages e-g) was filed on the 22nd day of March, 1976, in the Court of Criminal Appeals of Texas where the record is lodged. Appellant's supplemental notice of appeal to the Supreme Court of the United States (Appendix 5 at pages h-j) was filed on April 5, 1976, in the Court of Criminal Appeals of the State of Texas. Attached hereto and set forth herein as Appendix 8 at page v is a copy of a certificate of the Clerk of the Court of Criminal Appeals of Texas certifying as to pertinent actions of said state court.

## Jurisdictional Statutory Provision

The statutory provision believed to confer on the Supreme Court of the United States jurisdiction of this appeal is:

Title 28, Section 1257 (2):

> Title 28, Section 1257, State courts--Appeal--Certiorari.--Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) . . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) . . .

Cases Sustaining Jurisdiction

It is believed that the following cases sustain jurisdiction of the Supreme Court.

(1) Ex parte Mussett (1914), 162 S.W. 846. The Court of Criminal Appeals of Texas is a court of final jurisdiction in matters in which it has any jurisdiction, and from its action no appeal will lie.

(2) Tucker v. Texas (1946), 326 U.S. 517. Where a case involving a federal constitutional right could not be taken to a higher state court, it could be taken directly to the Supreme Court of the United States.

(3) Market Street Railway Co. V. Railroad Comm. (1945), 324 U.S. 548, 89 L. Ed. 1171. A timely petition for rehearing in the highest state court deferred finality for purposes of review by the Supreme Court until it was acted upon by the State court.

(4) New York ex rel. Bryant v. Zimmerman (1928), 278 U.S. 63. While it was required that a federal question be drawn in question by presentation to the state court, no particular form of words to that end was necessary, and it was sufficient if the effect of the judgment was to deny the claim of invalidity of a state statute.

(5) Schuylkill Trust Co. v. Pennsylvania (1935), 296 U.S. 113. Whether point was raised in

state court was itself a federal question, and to determine that matter Supreme Court was bound to examine record.

(6) Hammond v. Wittredge (1907), 204 U.S. 538. The jurisdiction of the Supreme Court could be invoked where the defendant claimed rights under a federal statute, and that statute was referred in and was an element of the decision of the state court.

(7) Indiana ex rel. Anderson v. Brand (1938), 303 U.S. 95. The Supreme Court could examine the opinion of the state court to ascertain whether a federal question was raised and decided.

(8) Whitfield v. Ohio (1936), 297 U.S. 431. Const. question not raised in state trial court but considered by state appellate court was within consideration of Supreme Court.

(9) Consolidated Coal Co. v. Illinois (1902), 185 U.S. 203. Where the invalidity of a state statute was set up by motion on the ground it was repugnant to the Constitution of the United States, the motion being made in arrest of judgment in the state court and denied, a federal question was presented.

(10) St. Louis & Iron Mountain & Southern Railway Co. v. Taylor (1908), 210 U.S. 281. Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in the Supreme Court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him.

(11) Cissna v. Tennessee (1918), 246 U.S. 289. If supreme court of state treated federal questions as necessarily involved, and decided them adversely to plaintiff in error, and could not otherwise have reached result that it did reach, it became immaterial how they were raised.

(12) Rock Island & Pacific Railway Co. v. Perry (1922), 259 U.S. 548. If the federal question, seasonably raised, was decided by the state supreme court, it was immaterial that it was not regarded as being in issue in the trial court.

(13) Charleston Federal Savings & Loan Assn. v. Alderson (1945), 324 U.S. 182. The Supreme Court was not required to inquire how and when the question of the validity of the statute was raised, when such question had been actually considered and decided by the state court.

(14) Commonwealth Bank v. Griffith (1840), 39 U.S. 56. Under this clause three things must concur to give jurisdiction: 1. The validity of a statute of a state, or of an authority exercised under a state, must be drawn in question. 2. It must be drawn in question upon the ground that it is repugnant to the constitution, treaties or laws of the United States. 3. The decision of the state court must be in favor of their validity.

(15) New York, New Haven & Hartford Railroad Co. v. New York (1897), 165 U.S. 628. Where the question of constitutionality of a state statute was properly raised in the state court, the Supreme Court had jurisdiction to re-examine the final judgment.

(16) Alabama State Federation of Labor v. McAdory (1945), 325 U.S. 450. The United States Supreme Court would condemn a state statute as in conflict with national legislation only if the conflict was clearly shown.

(17) Louis K. Liggett Co. v. Lee (1933), 288 U.S. 517. Where part of an act was declared to be violative of the Constitution of the United States, the court remanded the case to the state court for determination of the question as to the effect of the decision on the act as a whole.

(18) Murray v. Joe Gerrick & Co. (1934), 291 U.S. 315. Averment in petition for certiorari that state court misconstrued act of Congress conferred jurisdiction on the Supreme Court.

(19) Mallinckrodt Chemical Works v. Missouri (1915), 238 U.S. 41. The Supreme Court had jurisdiction where it appeared from the opinion of the state court that the question of equal protection was treated as being sufficiently raised, and was specifically dealt with and ruled against appellant.

(20) Silver v. Silver (1929), 280 U.S. 117. Where the record did not disclose the grounds considered by the appellate court, the grounds considered in the opinion of that court would be reviewed.

(21) Minneapolis, St. Paul, & Sault Ste. Marie Railway Co. v. North Dakota ex rel. McCue (1915), 236 U.S. 585. Supreme Court will review the findings of facts by a state court (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of facts are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.

(22) First National Bank v. Hartford (1927), 273 U.S. 548. The finding of the state court that an asserted federal question was without basis in fact was not binding on the Supreme Court.

(23) Brown v. McConnell (1888), 124 U.S. 489.

An appeal to the Supreme Court in a proper case was a matter of right, and its allowance was in reality nothing more than the doing of those things which were necessary to give the appellant the means of invoking the jurisdiction of the court.

## State Statute the Validity of Which is Involved

The state statute the validity of which was raised in the court below is the Texas Controlled Substance Act of 1973, Vernon's Ann. Civ. Stat. Art. 4476--15 et seq.; the specific provisions of which are being questioned in this appeal are cited as Vernon's Ann. Civ. Stat. Art. 4476--15, Sections 4.09(a)(3), 4.09(b)(1), 4.01(b)(2), and 2.04(a)(d)(4). These statutory provisions are lengthy, and, thus, same are set forth verbatim in Appendix 7 at pages p-u, the pertinent text being underlined for emphasis.

The federal laws which appellant says render the Texas statutes above invalid are contained in: (A) the Federal Comprehensive Drug Abuse and Control Act of 1970, Title 21, U.S.C.A., Sec. 801 et seq., the specific provisions of said act involved herein being cited as Title 21, U.S.C.A., Sections 843(a)(3)(c), 903 and 812, Schedule III (a)(2); (B) the supremacy clause of the Constitution of the United States, Article VI, Sec. 2. These federal statutory provisions are lengthy, and, thus, same are set forth verbatim in Appendix 6 at pages k-o, the pertinent text being underlined for emphasis. The key provision in these federal laws is Title 21, U.S.C.A., Sec. 903, set out fully at pages l-m of the Appendix.

## Federal Questions

(1) Whether the differences in the pertinent and analogous criminal penalty provisions in: (a) the Federal Comprehensive Drug Abuse and Control Act of 1970, Title 21, U.S.C.A., Sec.

843(a)(3)(c), and in (b) the Texas Controlled Substance Act of 1973, Vernon's Ann. Civ. Stat. Art. 4476--15, Sec. 4.01(b)(2), constitute a positive conflict such as prevents the two to consistently stand together as such conflict is proscribed by Title 21, U.S.C.A., Sec. 903.

(2) Whether a State criminal drug control law, enacted in 1973, which carries, upon conviction, a mandatory minimum penalty of not less than two years imprisonment is in positive conflict with, and cannot consistently stand together with, the analogous federal criminal drug control law which carries, upon conviction, not a mandatory minimum penalty provision but in lieu thereof carries a penalty provision range of punishment which does not require the assessment of any penal servitude but, unlike the state law, allows the judge or jury in their discretion to assess no penal servitude at all, or, alternatively, in their discretion, to assess a penal servitude of ". . . not more than 4 years" imprisonment.

(3) Whether the supremacy clause of the Constitution of the United States and Title 21, U.S.C.A., Sec. 903, of the Federal Comprehensive Drug Abuse and Control Act of 1970, Title 21, U.S.C.A., Sec. 801 et seq., hereinafter referred to as the Federal Act, make it unlawful for a State to enact and/or enforce criminal drug abuse and drug control legislation that sets a criminal penalty, Vernon's Ann. Civ. Stat., Art. 4476--15, Sec. 4.01(b)(2), for conduct amounting to a violation of a substantive provision of the State law, Vernon's Ann. Civ. Stat. Art. 4476--15, Sec. 4.09(a)(3), where that same conduct is likewise proscribed as a criminal violation in the Federal Act, Title 21, U.S.C.A. Sec. 843(a)(3), when, even though there is no conflict between that conduct proscribed in the State Act, there is a positive conflict between the pertinent criminal penalty provision of the Federal Act, Title 21, U.S.C.A., Sec. 843(a)(3)(c), and the

State penalty provision so that the two penalty provisions cannot consistently stand together.

(4) Whether a penalty provision in the Texas Controlled Substance Act of 1973, Vernon's Ann. Civ. Stat. Art. 4476--15, Sec. 4.01(b)(2), which carries, upon conviction, mandatory imprisonment, or, in the alternative, mandatory imprisonment plus a fine, is in positive conflict with, and cannot consistently stand together with, the analogous Federal criminal drug control law penalty provision, Title 21, U.S.C.A., Sec. 843(a)(3)(c), which carries, upon conviction, imprisonment or, in the alternative, a fine, or, in the alternative, imprisonment and a fine.

## Statement of the Case

Appellant was convicted in the state trial court of unlawful acquisition of phenmetrazine in violation of the Texas Controlled Substance Act of 1973 and assessed a punishment of two years imprisonment which was probated. The Texas Controlled Substance Act of 1973 makes it mandatory that a person convicted of unlawful acquisition of phenmetrazine be punished for a minimum term of two years imprisonment. Alternatively, the Texas punishment, which has a ceiling of twenty years imprisonment, can, in addition to the penal servitude, also carry a fine of up to $10,000.00. Appellant's punishment is suspended during the pendency of his appeal. Title 21, U.S.C.A. Sec. 903 of the Federal Comprehensive Drug Abuse and Control Act of 1970 requires that a criminal penalty provision of a state drug abuse and drug control law be drafted so that it is not in a positive conflict with the analogous federal law as prevents the two to consistently stand together in their penalty provisions. Appellant first challenged the validity of the Texas law under which he was prosecuted in the trial court by timely motion to quash the indictment based on a positive conflict in the penalty provisions as

proscribed by said Sec. 903, calling the trial court's attention to Title 21, U.S.C.A., Sec. 903, and the fact that Title 21, U.S.C.A., Sec. 843, is in such positive conflict with the Texas act so that the federal law could not consistently stand together with the Texas law; appellant citing, also, the supremacy clause of the Constitution of the United States. This motion, contained in the transcript of the record in the court below, entitled "Defendant's Objection to, Exception to and Motion to Set Aside, Quash and Dismiss Indictment", was timely denied by the trial court. Appellant next raised the federal question on the appeal of his conviction to the Texas Court of Criminal Appeals in his Brief for Appellant, wherein said Sec. 903 and the supremacy clause of the Constitution of the United States were presented to said State Court of Appeals by Appellant's First Point of Error, to wit:

> The Trial Court erred in its judgment of conviction and in its judgment of sentence in that the punishment provisions of the Texas Controlled Substance Act of 1973, under which Appellant was convicted, are unconstitutional and void (as same relate to the unlawful acquisition of phenmetrazine); said punishment provisions being in such positive conflict with the punishment provisions relating to phenmetrazine as contained in the Federal Controlled Substances Act of 1970, that the two sets of punishment provisions (State and Federal) cannot consistently stand together.

Appellant, in his brief, made it clear that he was raising constitutional issues addressed to the federal constitution, supremacy clause and, again, cited Title 21, U.S.C.A. Sec. 903.

## Federal Questions are Substantial

The questions raised are federal, none of them are frivolous or moot, and they are all substantial. The questions were timely raised in the state courts, and the Court of Criminal Appeals of Texas decided the questions adversely to appellant, holding the state law involved valid over appellant's claim that same was repugnant to the Federal Drug Abuse and Control Act of 1970 and thus repugnant to the Constitution of the United States, Supremacy Clause. In so far as appellant's research discloses, the Supreme Court nor any other federal court, as of the filing of this jurisdictional statement, has ruled on the questions here presented. The legislative history of the Federal Comprehensive Drug Abuse and Control Act of 1970 declares that it was the intent of Congress to do away with minimum mandatory criminal penalties and to make all drug abuse and drug control legislation, both state and federal, uniform and not in conflict. Sec. 903, Title 21, U.S.C.A., makes clear that the penalty provisions of drug abuse and drug legislation was of paramount concern to Congress, since Sec. 903 draws particular attention and scrutiny to future criminal penalty provisions by spotlighting same in the following language:

> "No provision of this title shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together." (Emphasis supplied.)

The intent of Congress in the Federal Act and the

frustration thereof by the pertinent penalty provision of the Texas Controlled Substance Act of 1973, under which appellant was convicted, are further spotlighted by the House Report as recorded in 3 U. S. Cong. & Admin. News 4566 (1970), wherein criminal penalty provisions were put on center stage, to wit:

> Under the heading, "Principal Purpose of the Bill", the House committee stated:
>
> This legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States (1) through providing authority for increased efforts in drug abuse prevention and rehabilitation of users, (2) through providing more effective means for law enforcement aspects of drug abuse prevention and control, and (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs. Id. at 4567.
>
> Under the heading, "Summary of the Bill":
>
> Criminal Penalties. -- The bill revises the entire structure of criminal procedures involving controlled drugs by providing a consistent method of treatment of all persons accused of violations. With one exception involving continuing criminal enterprises, all mandatory minimum sentences are eliminated. Id. at 4570.
>
> Under "Alternative Approaches to Drug Abuse":
>
> The reported bill combines both the punitive and rehabilitative approaches to the problem of drug abuse. It seeks, through appropriate regulation of the manufacture and distribution of drugs, to reduce the

availability of drugs subject to abuse except through legitimate channels of trade and for legitimate uses. The bill provides criminal penalties, with sentencing provisions generally left to the discretion of the courts, for offenses, involving the distribution, sale, and use of drugs subject to abuse, and provides for a greatly increased federal effort in the fields of prevention and rehabilitation. Id. at 4574.

Under "Criminal Penalties":

> The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences. Id. at 4576.

If the Supreme Court fails to take jurisdiction of this case on appeal and grant the relief sought by appellant, such failure will have far reaching effects, to wit:

(1) States other than Texas will take it as a signal that they too can enact legislation in defiance

of the supremacy clause of the Constitution of the United States;

(2) States other than Texas will take it as a signal that they can legislate drug abuse and drug control criminal penalties in clear defiance of the mandate of Sec. 903, Title 21, U.S.C.A.;

(3) Since ninety percent of the Texas Controlled Substance Act criminal penalty provisions assess a mandatory, minimum criminal penalty of not less than two years, the federal questions here raised are equally pertinent to the mass of crimes defined in said Texas Act and have been unlawfully affecting the freedom of persons convicted thereunder since August of 1973, the effective date of said Texas Act, and in the future will continue to unlawfully and unconstitutionally deprive said persons of their freedom without due process of law.

Thus, the questions here presented for their resolution are so substantial as to require plenary consideration, with briefs on the merits and oral argument.

The judgment of the Court of Criminal Appeals is final. Appellant has exhausted his state remedies since the Court of Criminal Appeals of Texas judgment cannot be further considered by said Court or any other court of Texas.

The nature of this case and the rulings of the lower court as demonstrated by Appellant's questions and the facts as heretofore set forth clearly bring this case within the jurisdictional provision relied on, Title 28, U.S.C.A., Sec. 1257(2). Ex parte Musset, supra; Tucker v. Texas, supra; Market Street Railway Co. v. Railroad Comm., supra.

The opinion of the Court of Criminal Appeals of Texas (Appendix 1 at pages a-b) clearly demonstrates

that said state court considered the federal questions raised by appellant on his appeal to the state court and that its judgment determined the question of the validity of the state statute under which appellant was convicted and sentenced against appellant in favor of its validity, and that without such a determination of the state statute's validity, the Court of Criminal Appeals of Texas could not have rendered the judgment it did. New York ex rel. Bryant v. Zimmerman, supra; Schuylkill Trust Co. v. Pennsylvania, supra; Indiana ex rel. Anderson v. Brand, supra; Cissna v. Tennessee, supra; Charleston Federal Savings & Loan Assn. v. Alderson, supra; Commonwealth Bank v. Griffin, supra; Alabama Federation of Labor v. McAdory, supra; Hammond v. Wittredge, supra; Silver v. Silver, supra; Minneapolis, St. Paul & Sault Ste. Marie Railroad Co. v. North Dakota ex rel. McCue, supra; First Nat. Bank v. Hartford, supra. The cases cited in this section entitled "Federal Questions are Substantial" are cited for the same propositions of law as set forth in the foregoing section of this statement, entitled "Cases Sustaining Jurisdiction", at pages 4-8 of this Jurisdictional Statement.

Considering the clear import of the concise language of Sec. 903, Title 21, U.S.C.A., directed at ". . . including criminal penalties" and the clear intent and purpose of Congress in the provisions of the House Report as hereinabove set forth, it would appear that the lower court of appeals either is ignoring the laws of the United States or is misconstruing the mandates of the federal laws involved and the supremacy clause of the Constitution of the United States. Appellant hopes and wishes to believe that the lower court is not consciously ignoring said federal laws and the Constitutional mandate of federal supremacy, but either way, whether ignoring or misconstruing, the Supreme Court was created to rectify such mistakes by state appellate courts under just these circumstances.

WHEREFORE, appellant prays that this jurisdictional statement is sufficient to require plenary consideration, with briefs on the merits and oral argument for the resolution of the questions raised and that same be resolved in favor of appellant and against appellee, resulting in a reversal of the Court of Criminal Appeals of Texas' judgment.

Respectfully submitted,

DALE OSSIP JOHNSON
ROBERT EVERETT L. LOONEY

ATTORNEYS FOR APPELLANT

## CERTIFICATE OF SERVICE

I, Dale Ossip Johnson, attorney for Eddie Mack Gipson and a member of the bar of the Supreme Court of the United States, do hereby certify that I have this day served three copies of the attached Jurisdictional Statement to each of the following named persons and offices, to wit: (1) The Honorable Jim Vollers, State's Attorney, Court of Criminal Appeals, Supreme Court Bldg., Austin, Texas; (2) The Honorable John Hill, Attorney General of Texas, Supreme Court Bldg., Austin, Texas; (3) The Honorable Robert O. Smith, District Attorney of Travis County, Texas, Travis County Courthouse, Austin, Texas; said service being properly effectuated by placing said copies in the U. S. Mail depository at the main post office in Austin, Texas, on the 5th day of April, 1976, addressed to said persons at their addresses as above set forth, first class postage prepaid.

WITNESS my hand at Austin, Texas, on this the 5th day of April, 1976.

DALE OSSIP JOHNSON
Attorney for Appellant,
Eddie Mack Gipson

# APPENDIX

APPENDIX 1

OPINION OF THE COURT OF
CRIMINAL APPEALS OF TEXAS

Eddie Mack Gipson, Appellant
No.: 51,017

V.

Appeal from
Travis County

The State of Texas, Appellee

OPINION

The offense is acquisition of phenmetrazine; the punishment, two years probated.

This is an appeal from an order revoking probation.

Appellant's grounds of error one and two challenge the constitutionality of the Texas Controlled Substance Act. He first contends that the act is in conflict with the Fed. Cont. Substance Act of 1970 and therefore must fall. This contention is based on the diversity of punishment set forth in each act. This contention has been held without merit in Atwood v. State, 509 S.W.2d 342, wherein we cite Rener v. Beto, 447 F.2d 20 (5th Cir. 1971). See also Stein v. State, 514 S.W.2d 927 and Morse v. State, 502 S.W.2d 805 and cases there cited.

We need not discuss appellant's contention that the present act is unconstitutional because it delegates to the Commission of Health Authority to add and subtract certain substances from the prohibited list of drugs. Phenmetrazine is named in the statute and not by the Commission of Health.

Both grounds of error are overruled, and the judgment is affirmed.

Dec. 3, 1975 Per curiam

APPENDIX 2

JUDGMENT OF THE COURT OF
CRIMINAL APPEALS OF TEXAS

THE COURT OF CRIMINAL APPEALS
OF TEXAS

Eddie Mack Gipson, Appellant
No.: 51,017

V.

Appeal from
Travis County

The State of Texas, Appellee

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

Dec. 3, 1975

APPENDIX 3

ORDER DENYING APPELLANT'S
MOTION FOR LEAVE TO FILE
MOTION FOR REHEARING

THE COURT OF CRIMINAL APPEALS
OF TEXAS

Eddie Mack Gipson, Appellant

No.: 51,017 V. Appeal from Travis County

The State of Texas, Appellee

"The motion for leave to file Appellant's Motion for Rehearing is denied 1-7-1976.

Douglas
Douglas
Judge."

APPENDIX 4

APPELLANT'S NOTICE OF APPEAL
TO THE SUPREME COURT OF THE
UNITED STATES

IN THE COURT OF CRIMINAL APPEALS OF THE
STATE OF TEXAS

Eddie Mack Gipson, Appellant

vs No.: 51,017

The State of Texas, Appellee

Appellant's Notice of Appeal to the
Supreme Court of the United States

To Said Honorable Court:

Comes Eddie Mack Gipson, Appellant, and files this his notice of Appeal to the Supreme Court of The United States, appealing from the final Judgment of the Court of Criminal Appeals of the State of Texas, which final Judgment Affirmed appellants conviction and sentence in Cause No: 46,120, The State of Texas vs Eddie Mack Gipson, In the 147th Judicial District Court of Travis County, Texas; and said final Judgment of the Court of Criminal Appeals of Texas having held valid a statute of the State of Texas contained in the Texas Controlled Substance Act of 1973 against appellant's claim that said statute was invalid and repugnant to the Constitution and laws of the United States of America.

This appeal is taken under Rules 10 and 11 of the Revised Rules of Procedure of the Supreme Court of the United States as amended, the Supremacy Clause, U. S. Constitution and under 21 U.S.C.A., Sec. 903, and Vernon's Ann. Penal Code, Art. 725f.

The said judgment of The Court of Criminal Appeals of the State of Texas became final on the seventh day of January, 1976.

Respectfully submitted,

/s/Robert Everett L. Looney
Robert Everett L. Looney
Attorney for
Eddie Mack Gipson, Appellant
700 Rio Grande
Austin, Texas 78701
Phone 512-474-6961

State of Texas .
.
County of Travis .

Before me, the undersigned authority, on this 22nd day of March, 1976, there personally appeared before me Robert Everett L. Looney who, after being sworn by me, under his oath deposed and said that the following is true and correct, to wit:

"My name is Robert Everett L. Looney. I am the attorney of record for Eddie Mack Gipson, Appellant vs. The State of Texas, Appellee, In The Court of Criminal Appeals of Texas. Pursuant to the Rules of Procedure of The Supreme Court of the United States, Rules 10, 11 and 33 I have this day served a copy of the attached "Appellant's Notice Of Appeal To The Supreme Court of The United States" on the following named persons and officers, to wit: (1) The Honorable Jim Vollers, State's Attorney, Court of Criminal Appeals, Supreme Court Bldg., Austin, Texas; (2) The Honorable John Hill, Attorney General of Texas, Supreme Court Bldg., Austin, Texas; (3) The Honorable Robert O. Smith, District Attorney of Travis County, Texas, Travis County Courthouse, Austin, Texas; said service being

properly effectuated by placing said copies in the U. S. mail depository at the main post office in Austin, Texas, on the 22nd day of March , 1976, addressed to said persons at their addresses as above set forth, first class postage prepaid."

WITNESS my hand at Austin, Texas, on this the 22nd day of March, 1976.

/s/Robert Everett L. Looney

SWORN TO AND SUBSCRIBED TO by the said Robert Everett L. Looney before me on this 22nd day of March, 1976; To certify which witness my hand and seal of office.

/s/Joe M. Blissit
Notary Public In and For
Travis County, Texas

(SEAL)

APPENDIX 5

APPELLANT'S FIRST SUPPLEMENTAL
NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

IN THE COURT OF CRIMINAL APPEALS OF THE
STATE OF TEXAS

Eddie Mack Gipson, Appellant

vs NO: 51017

The State of Texas, Appellee

To Said Honorable Court:

Comes Eddie Mack Gipson, Appellant, and without waiving his original Notice of Appeal to the Supreme Court of the United States filed on March 22, 1976, in the Court of Criminal Appeals of Texas, but still insisting on said notice of appeal, and files this his First Supplemental Notice of Appeal to the Supreme Court of the United States, appealing from the final judgment of the Court of Criminal Appeals of Texas (which judgment, dated December 3, 1975, became final by entry of the Court of Criminal Appeals of Texas' Order dated and entered on the 7th day of January, 1976, denying appellant's motion for leave to file Appellant's Motion for Rehearing), which final Judgment Affirmed appellant's conviction and sentence in Cause No: 46,120, the State of Texas vs. Eddie Mack Gipson, in the 147th Judicial District Court of Travis County, Texas; and said final Judgment of the Court of Criminal Appeals of Texas having held valid a statute of the State of Texas contained in the Texas Controlled Substance Act of 1973 against appellant's claim that said statute was invalid and repugnant to the Constitution and laws of the United States of America.

This appeal is taken pursuant to Title 28, U.S.C.A., Sec. 1257(2) and it involves the Texas Controlled Substance Act of 1970, Vernon's Ann. Civ. Stat. Art. 4476--15, previously cited as Vernon's Ann. Penal Code, Art. 725f, the Federal Comprehensive Drug Abuse and Control Act of 1970, Title 21, Sec. 801 et seq., with particular attention to Title 21, U.S.C.A., Sec. 903.

The said judgment of the Court of Criminal Appeals of the State of Texas became final on the seventh day of January, 1976.

Respectfully submitted,

/s/ Robert Everett L. Looney

Robert Everett L. Looney
Attorney for Eddie Mack Gipson, Appellant
700 Rio Grande,
Austin, Texas 78701
Phone 512-474-6961

STATE OF TEXAS )
)
COUNTY OF TRAVIS )

Before me, the undersigned authority, on this 5th day of April, 1976, there personally appeared before me Robert Everett L. Looney who, after being sworn by me, under his oath deposed and said that the following is true and correct, to wit:

"My name is Robert Everett L. Looney. I am the attorney of record for Eddie Mack Gipson, appellant in Cause Number 51,017, styled Eddie Mack Gipson, Appellant vs. The State of Texas, Appellee, in the Court of Criminal Appeals of Texas. Pursuant to the Rules of Procedure of the Supreme Court of

the United States, Rules 10, 11 and 33, I have this day served a copy of the attached "Appellant's Notice of Appeal to the Supreme Court of the United States" on the following named persons and offices, to wit: (1) The Honorable Jim Vollers, State's Attorney, Court of Criminal Appeals, Supreme Court Bldg., Austin, Texas; (2) The honorable John Hill, Attorney General of Texas, Supreme Court Bldg., Austin, Texas; (3) The Honorable Robert O. Smith, District Attorney of Travis County, Texas, Travis County Courthouse, Austin, Texas; said service being properly effectuated by placing said copies in the U. S. Mail depository at the main post office in Austin, Texas, on the 5th day of April, 1976, addressed to said persons at their addresses as above set forth, first class postage prepaid."

WITNESS my hand at Austin, Texas, on this the 5th day of April, 1976.

/s/ Robert Everett L. Looney

SWORN TO AND SUBSCRIBED TO by the said Robert Everett L. Looney before me on this 5th day of April, 1976; to certify which witness my hand and seal of office.

(SEAL)

Notary Public in and for
Travis County, Texas

## APPENDIX 6

### FEDERAL LAWS

(A) The Federal Comprehensive Drug Abuse and Control Act of 1970, Title 21 U.S.C.A. Sec. 801 et seq., the specific provisions of said act involved herein being cited as Title 21 U.S.C.A. Sec. 843(a)(3)(c), cited as Title 21 U.S.C.A. Sec. 903, and cited as Title 21 U.S.C.A., Sec. 812, Schedule III(a)(2), and (B) Article VI, Section 2, United States Constitution:

Title 21 U.S.C.A.

§843. Prohibited acts C--Penalties

(a) It shall be unlawful for any person knowingly or intentionally--

(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 308 of this title;
(2) to use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;
(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;
(4) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this title or title III; or
(5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit substance.

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this title or title III. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

(c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.
(Oct. 27, 1970, P.L. 91-513, Title II, Part D, § 403, 84 Stat. 1263.)

Title 21 U.S.C.A.

§903. Application of State law

No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a

positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.
(Oct. 27, 1970, P.L. 91-513, Title II, Part G, §708, 84 Stat. 1284.)

Title 21 U.S.C.A., §812, SCHEDULE III

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.
(2) Phenmetrazine and its salts.
(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.
(4) Methylphenidate.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.
(2) Chorhexadol.
(3) Glutethimide.
(4) Lysergic acid.
(5) Lysergic acid amide.
(6) Methyprylon.
(7) Phencyclidine.
(8) Sulfondiethylmethane.
(9) Sulfonethylmethane.
(10) Sulfonmethane.

(c) Nalorphine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.
(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.
(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts,
(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts. (Emphasis added.)

Article VI, Section 2, United States Constitution.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX 7

TEXAS LAWS

The Texas Controlled Substance Act of 1973, Vernon's Ann. Civ. Stat. Art. 4476--15 et seq., the specific provisions of said act involved herein being cited as Vernon's Ann. Civ. Stat. Art. 4476--15 Sec. 4.09(a)(3), Sec. 4.09(b)(1), Sec. 4.01(b)(2), and Sec. 2.04(a)(d)(4):

Vernon's Ann. Civ. Stat. Art. 4476--15

Sec. 4.09. (a) It is unlawful for any person knowingly or intentionally:

(1) to distribute as a registrant a controlled substance classified in Schedule I or II, except pursuant to an order form as required by Section 3.07 of this Act;

(2) to use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4) to furnish false or fraudulent material information in, or omit any material information from, any application, report, or other document required to be kept or filed under this Act, or any record required to be kept by this Act; or

(5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any controlled substance or container or labeling thereof so as to render the

controlled substance a counterfeit substance.

(b) An offense under Subsection (a) with respect to:

(1) a controlled substance classified in Schedule I or II is a felony of the second degree;

(2) a controlled substance classified in Schedule III is a felony of the third degree;

(3) a controlled substance classified in Schedule IV is a Class B misdemeanor. (Emphasis added.)

Vernon's Ann. Civ. Stat. Art. 4476--15

Sec. 4.01. (a) Misdemeanors are classified according to the relative seriousness of the offense into three categories:

(1) Class A misdemeanors. An individual adjudged guilty of a Class A misdemeanor shall be punished by:

(A) a fine not to exceed $2,000;
(B) confinement in jail for a term not to exceed one year; or
(C) both such fine and imprisonment.

(2) Class B misdemeanors. An individual adjudged guilty of a Class B misdemeanor shall be punished by:

(A) a fine not to exceed $1,000;
(B) confinement in jail for a term not to exceed 180 days; or
(C) both such fine and imprisonment.

(3) Class C misdemeanors. An individual adjudged guilty of a Class C misdemeanor shall be punished by a fine not to exceed $200.

(b) Felonies are classified according to the relative seriousness of the offense into three

categories:

(1) Felonies of the first degree. An individual adjudged guilty of a felony of the second degree shall be punished by confinement in the Texas Department of Corrections for life or for a term of not more than 99 years or less than 5 years.

(2) Felonies of the second degree. An individual adjudged guilty of a felony of the second degree shall be punished by confinement in the Texas Department of Corrections for a term of not more than 20 years or less than 2 years. In addition to imprisonment, an individual adjudged guilty of a felony of the second degree may be punished by a fine not to exceed $10,000.

(3) Felonies of the third degree. An individual adjudged guilty of a felony of the third degree shall be punished by confinement in the Texas Department of Corrections for a term of not more than 10 years or less than 2 years. In addition to imprisonment, an individual adjudged guilty of a felony of the third degree may be punished by a fine not to exceed $5,000.

(c) A court may set aside a judgment or verdict of guilty of any felony of the third degree other than a violation of Section 4.03 involving a controlled substance in Penalty Group 2 and enter a judgment of guilt and punish for a Class A misdemeanor if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such sentence would best serve the ends of justice.

(d) When a court is authorized to enter judgment of guilty and sentence for a lesser category of offense as provided in this subchapter, the court may authorize the prosecuting attorney to prosecute initially for the lesser category of offense. (Emphasis added.)

Sec. 2.04 (a) Schedule II shall initially consist of the controlled substances listed in this section.

(b) Any of the following substances, except those narcotic drugs listed in other schedules, however produced:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, including the following:

(A) Raw opium;
(B) Opium extracts;
(C) Opium fluid extracts;
(D) Powdered opium;
(E) Granulated opium;
(F) Tincture of opium;
(G) Apomorphine;
(H) Codeine;
(I) Ethylmorphine;
(J) Hydrocodone;
(K) Hydromorphone;
(L) Metopon;
(M) Morphine;
(N) Oxycodone;
(O) Oxymorphone;
(P) Thebaine;

(2) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (1) of this subsection, but not including the isoquinoline alkaloids of opium;

(3) Opium poppy and poppy straw;

(4) Coca leaves and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including

decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

(c) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine;
(2) Anileridine;
(3) Bezitramide;
(4) Dihydrocodeine;
(5) Diphenoxylate;
(6) Fentanyl;
(7) Isomethadone;
(8) Levomethorphan;
(9) Levorphanol;
(10) Metazocine;
(11) Methadone;
(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;
(13) Mormide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenyl-propane-carboxylic acid;
(14) Pethidine;
(15) Pethidine-Intermeidate-A, 4-cyano-1-methyl-4-phenylpiperidine;
(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;
(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carbosylic acid;
(18) Phenazocine;
(19) Piminodine;
(20) Racemethorphan;
(21) Racemorphan.

(d) Unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(1) amphetamine, its salts, optical isomers, and salts of its optical isomers;
(2) methamphetamine, including its salts, isomers, and salts of isomers;
(3) methylphenidate and its salts; and
(4) phenametrazine and its salts.

(3) Methaqualone.

APPENDIX 8

CLERK OF COURT OF CRIMINAL APPEALS
OF TEXAS' CERTIFICATE
OF PERTINENT DATES

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
OF TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 51.017 styled:

EDDIE MACK GIPSON Appellant

vs.

State of Texas,
Appellee

judgment of 147th District Court of Travis County, Texas, was affirmed on December 3, 1975, Appellant's Motion for Leave to File Motion for Rehearing denied on January 7, 1976, and on January 9, 1976, mandate issued.

THEREFORE, with the denying of Appellant's Motion for Permission to file Motion for Rehearing, this cause was disposed of by this Court on January 7, 1976, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and said judgment has now become final on the docket of this Court.

WITNESS my hand and Seal of said Court, at office, in Austin, Texas, this the 1st day of April A. D. 1976.

/s/ Glenn Haynes
GLENN HAYNES, CLERK
COURT OF CRIMINAL APPEALS
OF TEXAS

(SEAL)

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-1408

* * *

**EDDIE MACK GIPSON,**

Appellant

V.

**THE STATE OF TEXAS,**

Appellee

* * *

**On Appeal From The**
**Texas Court of Criminal Appeals**

* * *

## MOTION TO DISMISS OR AFFIRM

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
ANITA ASHTON
Assistant Attorneys General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Appellee

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-1408

* * *

EDDIE MACK GIPSON,

Appellant

V.

THE STATE OF TEXAS,

Appellee

* * *

On Appeal From The
Texas Court of Criminal Appeals

* * *

# MOTION TO DISMISS OR AFFIRM

* * *

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Texas Court of Criminal Appeals on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

## I.

## THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

### A. The Statute

This appeal raises the question of the validity of the

1973 Texas Controlled Substances Act, Tex. Rev. Civ. Stat. Ann. art. 4476-15. Appellant specifically questions that portion of the Act providing for felony punishment of two to twenty years in the Texas Department of Corrections and a possible fine not to exceed $10,000 for the acquisition of phenmetrazine. The portions of the Act in question are Tex. Rev. Civ. Stat. Ann. art. 4476-15, §§4.09(a)(3), 4.09(b)(1), 4.01(b)(2), 2.04(a)(d)(4).

### B. The Proceedings Below

The Appellant, after the effective date of the 1973 Texas Controlled Substances Act, was convicted of unlawful acquisition of phenmetrazine. Punishment was assessed at two years in the Texas Department of Corrections. However, imposition of the sentence was suspended and the Appellant was placed on probation for two years. Prior to trial, Appellant presented a motion to quash the indictment alleging that the 1973 Texas Controlled Substances Act was in direct conflict with 21 U.S.C. §843, and therefore could not stand under the supremacy clause of the Constitution of the United States. This motion was denied by the trial court. Appellant again presented this contention on direct appeal to the Texas Court of Criminal Appeals. The Court found this contention to be without merit and affirmed the conviction in an unpublished per curiam opinion. It is from this decision that appeal is taken.

## II.

## ARGUMENT

### This Case Does Not Present A Substantial Federal Question

The Tenth Amendment of the United States Constitution expressly reserves to the individual States police power to provide criminal penalties for acts



against the interest of the State. It has been held that "The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 n. 7 (1975).

Where Congress legislates in a field traditionally occupied by the States, it will be presumed that the police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). In 21 U.S.C. §903, Congress clearly stated that State statutes were not intended to be superceded by the Federal Act. It states:

> "No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."

Therefore, no substantial Federal question is presented by Appellant's allegation that the Texas Controlled Substances Act provides for a stricter penalty than does the Federal Act.

## III.

## CONCLUSION

Wherefore, Appellee submits that the questions upon which this cause depend are so unsubstantial as

not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or in the alternative to affirm the judgment entered in this cause by the Texas Court of Criminal Appeals.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General

ANITA ASHTON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Appellee

## PROOF OF SERVICE

I, Joe B. Dibrell, Assistant Attorney General of Texas, do hereby certify that three copies of the above and foregoing Motion to Dismiss or Affirm have been served by placing same in the United States Mail, postage prepaid, certified, on this the _____ day of June, 1976, addressed as follows: Dale Ossip Johnson, Attorney at Law, 1206 Perry Brooks Building, Austin, Texas 78701; and, Robert Everett L. Looney, Attorney at Law, 700 Rio Grande, Austin, Texas 78701.

JOE B. DIBRELL